Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

JEAN MARIE LOUIS,

Petitioner,

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction to consider substantial constitutional challenges to a Board of Immigration Appeal's final removal order where the petitioning alien is removable based on a criminal conviction enumerated in 8 U.S.C. § 1252(a)(2)(C)?

PARTIES TO THE PROCEEDINGS

Petitioner is an individual, Jean Marie Louis. Respondent is the United States Attorney General, the Honorable John D. Ashcroft.

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the Third Circuit (Pet. App. 1a-2a), the Board of Immigration Appeals (*id.* at 6a-7a, 8a-15a), and the Immigration Judge (*id.* at 16a-25a) are unreported.

JURISDICTION

The Third Circuit entered its order dismissing the Petition for Review on August 22, 2003 (*id.* at 2a), and denied Petitioner's request for rehearing *en banc* on October 3, 2003. *Id.* at 4a. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1252(a)(2)(C) of 8 U.S.C. provides:

> ORDERS AGAINST CRIMINAL ALIENS. Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

STATEMENT

This case presents the important federal question that this Court expressly left open in *Calcano-Martinez v. INS*, 533 U.S. 348, 350 n.2 (2001), and that is deeply dividing the lower courts: whether federal courts of appeals may consider substantial constitutional challenges to a final removal order by an alien who is removable for committing a crime identified in 8 U.S.C. § 1252(a)(2)(C).

1. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant

Responsibility Act ("IIRIRA"), 110 Stat. 3009-546, both of which contain comprehensive amendments to the Immigration and Nationality Act ("INA"), 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq.* One feature of these amendments was a provision limiting judicial review of final removal orders for aliens convicted of certain enumerated crimes ("criminal aliens"). Specifically, 8 U.S.C. § 1252(a)(2)(C) provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" a covered offense.

Since AEDPA's and the IIRIRA's passage, this Court has twice considered the meaning of § 1252(a)(2)(C). In *INS v. St. Cyr*, 533 U.S. 289, 297-98 (2001), the Court held that § 1252(a)(2)(C) does not deprive the federal district courts of their traditional habeas corpus jurisdiction, 28 U.S.C. § 2241. The Court reasoned that the language of § 1252(a)(2)(C) could not overcome the "strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *Id.* at 298. The Court also noted that any other interpretation would "raise serious constitutional questions" about Congress' ability to deprive immigrants of all judicial review. *Id.* at 314.

On the same day, the Court issued its opinion in *Calcano-Martinez v. INS*, 533 U.S. 348, 349 (2001), which considered whether the federal courts of appeals have jurisdiction over a criminal alien's petition for review where the alien argues that he is entitled to a discretionary waiver of deportation under the INA. The Court concluded that § 1252(a)(2)(C) stripped the federal courts of appeals of jurisdiction to entertain such a petition. *Id.*

Importantly, the Court left open the question whether the courts of appeals could exercise jurisdiction over substantial constitutional claims raised in a petition for review:

> The scope of this preclusion [§ 1252(a)(2)(C)] is not entirely clear. Though the text of the provision is quite broad, it is not without its ambiguities. Throughout this litigation, the Government has conceded that the courts of appeals have the power to hear petitions challenging the factual determinations thought to trigger the jurisdiction-stripping provision (such as whether an individual is an alien and whether he or she has been convicted of an "aggravated felony" within the meaning of the statute). *See* Brief for Respondent 22-23. In addition, the Government has also conceded that the courts of appeals retain jurisdiction to review "substantial constitutional challenges" raised by aliens who come within the strictures of § 1252(a)(2)(C). *See id.*, at 23-24. As the petitions in this case do not raise any of these types of issues, we need not address this point further. Nonetheless, it remains instructive that the Government acknowledges that background principles of statutory construction and constitutional concerns must be considered in determining the scope of IIRIRA's jurisdiction-stripping provisions.

Id. at 350 n.2.

2. In 1992, Petitioner Jean Marie Louis ("Louis") fled Haiti for Guantanamo Bay, Cuba, fearing persecution for his political activities, namely his role in the Committee Lavallas (an organization supporting Jean-Bertrand Aristide). Pet. App. 9a. After spending three-and-a-half months in Guantanamo, Louis was paroled to the United States. *See id.*

Once in the United States, Louis occasionally operated a "gypsy" cab. *Id.* at 10a. In January 1998, he was hired to deliver a package that, unbeknownst to him, contained marijuana. *Id.* Louis was convicted of possession of, with intent to distribute, marijuana, and sentenced to 11 1/2 to 23 months in prison. *Id.* at 14a.

3. On May 3, 2000, Louis received a Notice of Intent to Issue a Final Administrative Removal Order, charging him with removability as an alien convicted of an aggravated felony. *See* 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii). A Final Administrative Removal Order was issued on June 19, 2000. Pet. App. 9a.

a. At his removal hearing, Louis argued that he would be harmed by anti-Aristide forces and detained and abused as a criminal deportee if he were returned to his homeland. *See* Pet. App. 18a. His Immigration Judge ("IJ") agreed and granted Louis a withholding of removal under Article III of the Convention Against Torture ("CAT") on February 6, 2001. Pet. App. at 24a; *see also* United Nations Convention Against Torture & Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. res. 39/46 (annex, 39 U.N. GAOR Supp. (no. 51) at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987; for the United States Nov. 20, 1994). The IJ found that Petitioner was eligible for withholding because he was a credible witness and had *not* committed a "particularly serious crime." Pet. App. 18a, 22a; *see* 8 U.S.C. §1231(b)(3)(B). In addition, the documentary evidence in the record established that criminal deportees were being indefinitely detained upon return to Haiti and tortured. Pet. App. 18a-20a. The IJ also commented that he had heard from State Department employees that criminal returnees to Haiti were indefinitely detained by Haitian officials. *Id.* at 20a

b. The INS appealed the IJ's decision to the Board of Immigration Appeals ("BIA"), arguing that Louis had not met his burden of proof and that the IJ had wrongly relied on evidence outside of the record. Pet. App. 11a. In an opinion dated October 24, 2001, the BIA dismissed the INS's appeal. *Id.* at 15a. The BIA observed that "the evidence before us establishes that criminal returnees are being indefinitely detained upon return to Haiti, and that the country has an established record of the serious mistreatment of detainees

and prisoners. This evidence is sufficient to establish that it is more likely than not that the [Petitioner] will face torture upon return to Haiti." *Id.*

c. A year-and-a-half later, in the opinion at issue here, the BIA *sua sponte* reversed its judgment and stripped Louis of his withholding right without providing Louis any notice of the proceeding. Pet. App. 6a-7a.

Specifically, thirteen months after the BIA issued its decision granting Louis' withholding, the INS filed an untimely Motion to Reopen the case. *Id.* at 6a. Although the INS attempted to serve the motion on the attorney who had acted as Louis' counsel during the earlier proceedings, its mailing was returned "addressee unknown" because the attorney had left his prior law firm. *See* Louis' Resp. to Order to Show Cause Ex. B (filed in 3d Cir. June 19, 2003). Louis himself did not receive a copy of the motion; apparently no attempt was made to serve Louis even though he was regularly meeting with his immigration officer.

On February 26, 2003, without obtaining any input from Louis, the BIA vacated its previous decision. Pet. App. 7a. In its opinion, the BIA expressly acknowledged that the INS's motion was untimely, and thus it could not reopen the case on that motion. *See id.* at 6a; 8 C.F.R. § 3.2(c)(2). It nonetheless concluded that it could exercise *sua sponte* authority and reopened the removal proceeding. Pet. App. 6a. Based solely on its decision in an intervening case, *In re J-E-*, 23 I&N Dec. 291 (BIA 2002), the BIA concluded that there was insufficient evidence to demonstrate that Haitian authorities intentionally create and maintain conditions to inflict torture on returning immigrants. Pet. App. 7a. Louis' previous attorney received notice of this BIA Order, apparently because this time the BIA ascertained his new address from unrelated administrative records.

4. On March 28, 2003, Louis filed a Petition for Review and a Motion for Stay of Removal in the United States Court of Appeals for the Third Circuit. On June 9, 2003, the court

of appeals ordered Louis to show cause why it should not dismiss his petition for review for want of jurisdiction under 8 U.S.C. § 1252(a)(2)(C), because Louis was convicted of one of the offenses enumerated in that provision. Pet. App. 5a.

In response to the court's order, Louis argued, *inter alia*, that the federal court of appeals could exercise jurisdiction over his substantial constitutional claims, notwithstanding the language of § 1252(a)(2)(C). Louis recognized that the Third Circuit had rejected a similar argument in *Liang v. INS*, 206 F.3d 308, 316-19 (3d Cir. 2000), *cert. denied*, 533 U.S. 949 (2001), but urged the court to revisit this holding in light of *Calcano-Martinez*, 533 U.S. at 350 n.2, and *Demore v. Kim*, 123 S. Ct. 1708, 1714 (2003)—the latter of which held in the context of a different jurisdiction-stripping provision that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."

Importantly, Respondent *agreed* that the Third Circuit "should revisit its holding in *Liang v. INS*, 206 F.3d 308 (3d Cir. 2000), that the courts of appeals do not retain jurisdiction to review substantial constitutional claims raised in a petition for review by an alien convicted of an aggravated felony." Pet. App. 27a-28a. Respondent argued only that Louis had no substantial constitutional claim. *Id.* at 28a.

On August 22, 2003, the Third Circuit dismissed Louis' petition for lack of jurisdiction. Pet. App. 1a-2a. Citing its decision in *Liang*, the court concluded that it had "no jurisdiction over a criminal alien's 'substantial constitutional claims' raised in a petition for review," and denied Louis' request for stay of removal as moot. *Id.* at 2a. The court did not consider the merits of Louis' constitutional claims. *Id.*

5. On September 5, 2003, Louis filed a timely petition for rehearing and rehearing *en banc*. The Third Circuit denied the petition on October 3, 2003. Pet. App. 3a-4a.

REASONS FOR GRANTING THE WRIT

The Third Circuit's decision implicates a deep and persistent split of authority over the meaning of § 1252(a)(2)(C). Like the Third Circuit, the Ninth Circuit has concluded that § 1252(a)(2)(C) strips the federal appellate courts of jurisdiction to consider a criminal alien's substantial constitutional claims. In contrast, the Seventh, Eighth and Eleventh Circuits have reached the contrary conclusion, citing this Court's footnote in *Calcano-Martinez* and the background principle that federal jurisdiction over substantial constitutional claims must be expressly precluded. The Fifth Circuit has also strongly suggested in *dicta* that it agrees with these courts and will entertain such constitutional claims in the future. The split of authority, indeed, extends beyond the courts of appeals, as the Executive Branch has argued to this Court and numerous appellate courts that § 1252(a)(2)(C) cannot be read to preclude jurisdiction over a criminal alien's substantial constitutional claims and has even encouraged (to no avail) the Third and Ninth Circuits to reconsider their contrary rulings.

This split of authority should not be allowed to persist, as the jurisdictional question presented is exceedingly important to both aliens and the Executive Branch. It is well established that habeas review and judicial review are different in scope and character, such that whether direct judicial review is available impacts the arguments and remedies available to criminal aliens. In addition, resolving the split of authority now is necessary to correct the lack of procedural uniformity in the lower courts. Currently, some courts of appeals *require* criminal aliens to petition for direct review of substantial constitutional claims or forfeit those claims on habeas review, while other courts do not allow petitions for review by criminal aliens.

This petition for a writ of *certioriari* is the appropriate vehicle for resolving the important federal jurisdictional

question presented here. The Third Circuit expressly declined to review the merits of Louis' constitutional claims or consider whether his claims were "substantial" within the meaning of *Calcano-Martinez*. Rather, it expressly found jurisdiction wanting in all events. Thus, this case clearly presents the jurisdictional question directly and without an alternative holding.

Finally, review is warranted because the lower court erred. In light of the background principle that the jurisdiction of federal courts over substantial constitutional claims cannot be revoked absent a sufficiently express statement by Congress, § 1252(a)(2)(C) must be read as permitting jurisdiction over these claims. Any other reading of the provision would cause anomalies within the INA and undercut Congress' preference for judicial review of substantial constitutional claims in the courts of appeals. Accordingly, every factor that this Court usually considers when deciding whether to grant a writ of *certiorari* counsels in favor of granting this Petition.

I. THE COURT SHOULD RESOLVE THE DEEP AND PERSISTENT SPLIT OVER WHETHER § 1252(A)(2)(C) STRIPS THE COURTS OF APPEALS OF JURISDICTION OVER A CRIMINAL ALIEN'S SUBSTANTIAL CONSTITUTIONAL CLAIMS.

The federal courts of appeals are deeply divided over the question presented here—to wit, whether § 1252(a)(2)(C) strips them of jurisdiction over the substantial constitutional claims of criminal aliens.

A. The Ninth Circuit Has Joined The Third Circuit In Holding That Courts Of Appeals Are Precluded From Considering The Substantial Constitutional Claims Of Criminal Aliens.

Like the Third Circuit below and in *Liang*, the Ninth Circuit has concluded that the federal courts of appeals lack jurisdiction to consider substantial constitutional claims on

direct review. *See Chant v. Ashcroft*, No. 02-71981, 2003 WL 21782679, at *1 (9th Cir. July 29, 2003) ("Constitutional challenges to the removal of aliens who have been convicted of one of the enumerated offenses must be raised in district court through habeas petitions."); *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 879 (9th Cir. 2003) ("Constitutional claims such as that of Flores-Miramontes, a controlled substance offender who raised a due process challenge to the BIA's application of a filing deadline when the INS was alleged to have caused the relevant delay . . . are therefore cognizable if at all on habeas, not direct review."); *Alibutod v. Ashcroft*, No. 02-71636, 2003 WL 21500045, at *2 (9th Cir. June 25, 2003) ("[U]nder 8 U.S.C. § 1252(a)(2)(C), we also lack jurisdiction to consider the petitioner's constitutional claims."); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1064 (9th Cir. 2003) (same).

In *Cedano-Viera v. Ashcroft*, for example, the Ninth Circuit concluded that "the court of appeals, having no jurisdiction to review [a criminal alien's] removal order because he was convicted of an aggravated felony, lacks jurisdiction to consider his constitutional challenges as well . . . . [C]onstitutional claims by aliens who are subject to removal as aggravated felons must be raised in the district court through habeas corpus proceedings." 324 F.3d at 1064. The court rejected the argument "that *Calcano-Martinez* 'opens the door' for us to determine that IIRIRA's jurisdiction-stripping provisions do not divest the court of appeals of jurisdiction over substantial constitutional . . . questions." *Id.* at 1068. In the Ninth Circuit's view, "the thrust of the opinion in *Calcano-Martinez*, together with the Court's opinion in *St. Cyr* . . . is that jurisdiction over constitutional issues and statutory issues is withdrawn from the courts of appeals and that the place to resolve such issues is in the district courts through habeas corpus." *Id.* at 1069.

The Ninth Circuit nonetheless acknowledged that its decision squarely conflicts with the conclusions of other

courts that have held that "appellate courts do retain jurisdiction to review substantial constitutional challenges by aliens convicted of aggravated felonies." *Id.* at n.6 (citing *Balogun v. Ashcroft*, 270 F.3d 274, 278 n.11 (5th Cir. 2001); *Brooks v. Ashcroft*, 283 F.3d 1268, 1273 (11th Cir. 2002)).

B. The Seventh, Eighth, And Eleventh Circuits, As Well As The Executive Branch Of The United States, Have Reached The Opposite Conclusion.

In contrast to the Third and Ninth Circuits, the Seventh Circuit has held that a criminal alien's substantial constitutional challenges to a BIA removal order can be reviewed directly by the federal courts of appeals. Shortly after the passage of § 1252(a)(2)(C), the Seventh Circuit held in *LaGuerre v. Reno*, 164 F.3d 1035, 1040 (7th Cir. 1998), *cert. denied*, 528 U.S. 1153 (2000), that the courts of appeals maintain the power to consider constitutional issues and correct "bizarre miscarriages of justice" notwithstanding § 1252(a)(2)(C)'s language. *See also Flores-Leon v. INS*, 272 F.3d 433, 437 (7th Cir. 2001) ("[W]e have previously held that an alien may challenge his deportability on constitutional grounds directly in the court of appeals provided that he raises a substantial constitutional claim." (citing *Lara-Ruiz v. INS*, 241 F.3d 934, 939 (7th Cir. 2001), and *LaGuerre*, 164 F.3d at 1040)).

More recently, in *Robledo-Gonzales v. Ashcroft*, 342 F.3d 667, 679-81 (7th Cir. 2003), the Seventh Circuit expressly reaffirmed its conclusion in *LaGuerre* and held that a criminal alien raising substantial constitutional claims on *habeas* fails to satisfy the habeas exhaustion requirement unless he submits those claims to the court of appeals on direct review. As the court explained:

> In sum, this court repeatedly has acknowledged its authority to review substantial constitutional questions presented through a petition for review of a final order of the BIA. Furthermore, this court has continued to assert its jurisdiction to review substantial constitutional

> questions even after the Supreme Court's decision in *St. Cyr*. Finally, the Supreme Court has not held that the ability of the district courts to entertain an alien's habeas action negates the authority of the courts of appeals to consider substantial constitutional questions when presented through a petition for review of a decision of the BIA.

Id. at 680.

The decisional authority of the Eleventh Circuit is equally well established. In *Moore v. Ashcroft*, 251 F.3d 919 (11th Cir. 2001), the Eleventh Circuit observed that, although § 1252(a)(2)(C) "strips us of jurisdiction to review [the criminal alien's] final order of removal," the provision "does not necessarily mandate dismissal of the petition because we still have jurisdiction . . . to evaluate substantial constitutional challenges to the INA." *Id.* at 923-24 (citing *Galindo-Del Valle v. U.S. Attorney General*, 213 F.3d 594, 598 (11th Cir. 2000); *Richardson v. Reno*, 180 F.3d 1311, 1316 n.5 (11th Cir. 1999). *See also Fernandez-Bernal v. U.S. Attorney General*, 257 F.3d 1304, 1308, 1311 (11th Cir. 2001) (same). And, in *Balogun v. U.S. Attorney General*, 304 F.3d 1303, 1305 (11th Cir. 2002), the Eleventh Circuit concluded that it had jurisdiction to consider a criminal alien's claim that he was denied due process because his immigration appeal was too difficult to understand and he was deprived of counsel, observing that, "even if § 1252(a)(2)(C) applies, appellate review of Balogun's order may still be appropriate if he raises a 'substantial constitutional' challenge to his removal." *See also id.* at 1310 ("As previously noted, several of our precedents have acknowledged such a possibility." (citing cases)); *see also Patel v. U.S. Attorney General*, 334 F.3d 1259, 1262-63 (11th Cir. 2003) ("The parties before us agree, however, that under the case law of our court, § 1252(a)(2)(C) does not strip us of jurisdiction to hear and determine substantial constitutional issues.").

The Eighth Circuit recently joined these courts and, citing the decisions of the Seventh Circuit, concluded that "[t]his Court has jurisdiction to consider substantial constitutional challenges to the Immigration and Nationality Act." *Vasquez-Velezmoro v. INS*, 281 F.3d 693, 696 (8th Cir. 2002).

Although not directly deciding the issue, the Fifth Circuit has repeatedly indicated that it will exercise jurisdiction over substantial constitutional claims raised by criminal aliens. Initially, in *Nehme v. INS*, 252 F.3d 415, 420 (5th Cir. 2001), the court indicated that it had jurisdiction to review whether federal statutes were "being constitutionally applied" to criminal aliens. Since then, the court has observed that it "also retain[s] jurisdiction to consider whether the jurisdiction-stripping provisions of the statute are being constitutionally applied and to consider any substantial constitutional claims," but the court had no occasion to exercise this jurisdiction because no such claims were raised in the proceeding before it. *Balogun v. Ashcroft*, 270 F.3d 274, 278 n.11 (5th Cir. 2001).

The Executive Branch, moreover, has expressly stated its views on the question presented and, in doing so, has placed itself firmly within the Seventh, Eighth and Eleventh Circuits' camp. In his merits brief in *Calcano-Martinez*, the Solicitor General argued to this Court on behalf of the United States that:

> [W]e do not understand Section 1252(a)(2)(C) as precluding a court of appeals from reviewing substantial constitutional challenges to an alien's removal order, even if the BIA has found the alien to be removable based on a criminal conviction referred to in that Section. Although the preclusion of review in Section 1252(a)(2)(C) has a broad reach, we believe it is appropriate to interpret it in light of this Court's jurisprudence directing that Acts of Congress should not be construed to preclude review of constitutional claims absent a clear congressional

> expression to that effect. *See Webster v. Doe*, 486 U.S. 592, 603 (1988); *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975); *Johnson v. Robison*, 415 U.S. 361, 366-74 (1974). Notwithstanding Section 1252(a)(2)(C)'s categorical language, neither the text nor the legislative history of that provision adverts specifically to preclusion of review of constitutional claims, and so the courts of appeals retain authority to consider such claims. Thus, a court of appeals would not be precluded from reviewing an alien's contention that a provision of the INA defining a particular offense as an 'aggravated felony,' or rendering the alien removable based on a conviction for that offense, is unconstitutional. Nor, in our view, would the court of appeals be precluded from reviewing a substantial contention that the immigration judge (IJ) or the BIA had not observed fundamental guarantees of due process before concluding that the alien was removable based on a conviction for such an offense.

Br. of Resp. in *Calcano-Martinez v. INS*, No. 00-1011, 2001 WL 327595, at *23-24 (filed in U.S. March 28, 2001).

Consistent with these representations, in the proceeding below and in numerous other appellate proceedings, Respondent has consistently conceded the courts of appeals' jurisdiction to review substantial constitutional claims raised in petitions for review by criminal aliens. *See Flores-Garza v. INS*, 328 F.3d 797, 801 (5th Cir. 2003) (stating the government's argument that "the statutory and constitutional claims presented by Flores's petition" could be considered by court of appeals on direct review); *Cedano-Viera*, 324 F.3d at 1068 ("Both Cedano-Viera and the government suggest that . . . we retain jurisdiction to hear constitutional claims.").

Indeed, the Executive Branch has expressly asked the Third Circuit and Ninth Circuit to reconsider their conclusion that they lack jurisdiction over a criminal aliens' substantial constitutional claims. *See* Pet. App. 27a-28a

(observing that "the government agrees that this Court should revisit its holding in *Liang v. INS*, 206 F.3d 308 (3d Cir. 2000), that the courts of appeals do not retain jurisdiction to review substantial constitutional claims raised in a petition for review by an alien convicted of an aggravated felony"); *Cedano-Viera*, 324 F.3d at 1068-69 (observing that the Federal Government had asked the Ninth Circuit to reconsider its precedent in light of *Calcano-Martinez*).

This conflict most assuredly will not resolve itself but will persist and worsen absent this Court's intervention. At this point, there is no reason to expect that the Third or Ninth Circuit will reconsider its precedent. Both courts have expressly declined the Executive Branch's aforementioned invitation to reconsider their conclusions that § 1252(a)(2)(C) strips them of jurisdiction to consider a criminal alien's substantial constitutional claims. *See* Pet. App. 2a ("We see no basis for this panel to 'revisit' *Liang* in light of *Calcano-Martinez*, or the other cases cited by Louis.") (internal citations omitted); *Cedano-Viera*, 324 F.3d at 1069 (stating of *Calcano-Martinez*, "we do not believe that it opens a door which our own precedent has closed"). And the Third Circuit has denied a motion to rehear this case *en banc* despite the deep circuit conflict on the question presented and its status as a member of the minority judicial view. Pet. App. 3a-4a.

The Seventh and Eleventh Circuits, moreover, have repeatedly reaffirmed their reading of § 1252(a)(2)(C) in the face of this circuit conflict. Indeed, just months ago, the Seventh Circuit expressly rejected the argument that it should reconsider its jurisprudence and held that the law of that circuit definitively establishes "the right of aliens to present substantial constitutional questions to this court through a petition for review of a final order of the BIA." *Robledo-Gonzales*, 342 F.3d at 681. And the Eleventh Circuit has reaffirmed the same conclusion in at least eight cases. *See Patel*, 334 F.3d at 1262-63; *Garcia v. U.S.*

Attorney General, 329 F.3d 1217, 1222 (11th Cir. 2003); *Balogun*, 304 F.3d at 1305; *Brooks v. Ashcroft*, 283 F.3d 1268, 1272-73 (11th Cir. 2002); *Oguejiofor v. U.S. Attorney General*, 277 F.3d 1305, 1308-09 (11th Cir. 2002); *Fernandez-Bernal*, 257 F.3d at 1308; *Moore*, 251 F.3d at 923-24; *Richardson*, 180 F.3d at 1316 n.5. Thus, only this Court can resolve the judicial conflict.

II. THE QUESTION PRESENTED HAS SUBSTANTIAL NATIONAL IMPORTANCE AND REQUIRES IMMEDIATE RESOLUTION BY THIS COURT.

In addition to implicating a split of authority, the question presented is one of tremendous importance both to individuals and to the Executive Branch. Failure to resolve it promptly, moreover, will cause considerable confusion in the lower courts.

The ability to have direct appellate review of a substantial constitutional claim is of considerable importance to criminal aliens. Absent direct review, the criminal alien can attempt to pursue only a habeas remedy in the district court under 28 U.S.C. § 2241. Although this Court has "declin[ed] to define the precise limit of jurisdiction under 28 U.S.C. § 2241" in the immigration context, *see* 8 Charles Gordon, *et al.*, IMMIGRATION LAW & PROCEDURE § 104.04[4][b], at 104-48.9 (Sept. 2003), habeas review "is generally more limited than on direct review." *Wang v. Ashcroft*, 320 F.3d 130, 143 (2d Cir. 2003); *see Heikkila v. Barber*, 345 U.S. 229, 235-36 (1953) ("[I]t is the scope of inquiry on habeas corpus that differentiates" habeas review from "judicial review."). The Ninth Circuit, moreover, has suggested that habeas review may not encompass claims challenging the constitutionality of the removal process in an individual case. *See Noriega-Lopez*, 335 F.3d at 879. The INA, itself, also contains numerous other limits on the kinds of matters subject to habeas review. *See* 8 U.S.C. § 1252.

Beyond differences between the kind of review that is allowed in habeas and direct review proceedings, the ability of an alien to receive direct review without having to be "in custody" (as is required for habeas review under § 2241) is a distinction that makes a tremendous practical difference to aliens. *See* 8 IMMIGRATION LAW & PROCEDURE, *supra*, at § 104.04[5][a], [b]. An alien can pursue direct review without having to part from his or her family or operate under considerable constraints.

In addition, the question presented is substantially important from a judicial efficiency standpoint. The lack of direct review undercuts the government's and alien's ability to possibly avoid habeas proceedings altogether. As the Fifth Circuit has explained, "[t]he government appears to take this position [that substantial constitutional claims are reviewable] in order to limit the circumstances under which a § 2241 habeas proceeding may be appropriate, streamline the alien removal process, and avoid possible constitutional concerns that could be associated with the deprivation of judicial review." *Flores-Garza*, 328 F.3d at 801 n.4.

In all events, the split of authority should not be allowed to persist in light of the absence of procedural uniformity in the lower courts. Currently, criminal aliens in the Seventh, Eighth and Eleventh Circuits will forgo all review *unless* they file a petition for direct review in the court of appeals; otherwise, the alien fails to satisfy the exhaustion requirements of habeas law. *See Robledo-Gonzales*, 342 F.3d at 680-81 (constitutional claims raised on habeas unreviewable where criminal alien failed to raise them in direct review petition). The Third and Ninth Circuits, however, require no such filing of a direct review petition, although criminal aliens sometimes file petitions for review in these circuits out of "an abundance of caution." *See* Br. of Pet'r in *Tatarinov v. Ashcroft*, No. 03-70672, 2003 WL 22752980, at *2-3 (filed in 9th Cir. Sept. 24, 2003). Such non-uniformity of procedural law is intolerable in the immigration context because this area of law is "entirely

within the domain of federal authority." 8 IMMIGRATION LAW & PROCEDURE, *supra*, § 104.03, at 104-33. Moreover, allowing such differences in procedure to persist "would be in substantial tension with the interest in uniformity served by Congress' modification" of habeas laws. *Williams v. Taylor*, 529 U.S. 362, 390 n.15 (2000); *see Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992) (noting the importance of uniformity in the law of habeas corpus).

This case is an excellent vehicle for the Court to use in deciding whether courts of appeals may exercise jurisdiction over a criminal alien's petition for review that raises substantial constitutional claims. The court below considered this jurisdictional question in its purest form—that is, it concluded that it lacks jurisdiction over all claims raised on a petition for review by criminal aliens without evaluating whether Louis had presented "substantial" constitutional claims or deciding the merits of his constitutional claims. *See* Pet. App. 2a. As a result, this case does not have the vehicle problem that plagues some cases involving the question presented: the lower court decides both that jurisdiction exists *and* that the underlying constitutional claim lacks merit, or assumes that jurisdiction exists and decides the underlying claim against the alien, thereby providing an alternative legal rationale that might preclude the Court from reaching the merits of the question presented. *See, e.g.*, *Vasquez-Velezmoro*, 281 F.3d at 696, 698 (holding that court could exercise jurisdiction over substantial constitutional claims but deciding underlying claim lacked merit); *Oguejiofor*, 277 F.3d at 1308-09 (same); *Morales Ventura v. Ashcroft*, 348 F.3d 1259, 1262 (10th Cir. 2003) (leaving jurisdictional question open and deciding constitutional claim against alien); *Lake v. Ashcroft*, No. 99-4125, 2002 WL 1770756, at *1 (2d Cir. Aug. 1, 2002) (observing that there is "some uncertainty" about jurisdiction over substantial constitutional claims under § 1252(a)(2)(C) but concluding that the court "need not resolve this issue" because no substantial constitutional claim had been

presented); *Edwards v. Ashcroft*, No. 03-1101, 2003 WL 22366183, at *1 (4th Cir. Oct. 17, 2003) (same). In short, the Court should resolve the question presented, and this is an excellent vehicle through which it can be resolved.

III. THE LOWER COURT'S JURISDICTIONAL DECISION IS ERRONEOUS.

This Court's review is further appropriate because the Third Circuit's decision is erroneous.

A. Section 1252(a)(2)(C) Does Not Preclude Appellate Court Review Of Substantial Constitutional Claims.

The lower court's conclusion was erroneous because it failed to apply the correct principle of statutory construction when reading § 1252(a)(2)(C). The court below concluded that no jurisdiction exists because § 1252(a)(2)(C) purports generally to deprive the federal courts of all jurisdiction over claims raised by criminal aliens. Pet. App. 1a-2a. In *Webster v. Doe*, 486 U.S. 592, 603 (1988), however, the Supreme Court concluded that jurisdictional statutes should not be construed to preclude judicial review of constitutional issues unless the statute says so *explicitly*. *See also Czerkies v. U.S. Dept. of Labor*, 73 F.3d 1435, 1439 (7th Cir. 1996). Because § 1252(a)(2)(C) contains no specific language precluding review of substantial constitutional claims, it cannot properly be read as limiting the federal courts' jurisdiction over them.

Congress' failure to identify constitutional claims in § 1252(a)(2)(C) is telling in light of the fact that, when Congress enacted the provision, *Webster* was well-established precedent and aliens routinely sought review of their constitutional challenges to removal orders through petitions for review in the courts of appeals. *See, e.g.*, *Massieu v. Reno*, 91 F.3d 416, 420-24 (3d Cir. 1996) (district court lacked jurisdiction over constitutional challenge to deportation order which court of appeals had exclusive jurisdiction to entertain). Indeed, from 1961 to the

enactment of IIRIRA, review petitions in the courts of appeals were regarded as the "sole and exclusive" means for aliens to challenge their deportation orders. *See* 8 U.S.C. § 1105a(a) (1994); *Ghorbani v. INS*, 686 F.2d 784 (9th Cir. 1982).

That Congress meant to allow substantial constitutional challenges to continue to be heard by the courts of appeals is reinforced by the IIRIRA's exclusive judicial review provisions, which reflect Congress' preference for review of removal orders in the courts of appeals, not the district courts. *See* 8 U.S.C. § 1252(a) (judicial review "is governed only" by the provisions specified); *id.* § 1252(b)(9) (judicial review of all questions of law and fact, "including interpretation and application of constitutional and statutory provisions," arising in removal proceedings "shall be available only in judicial review of a final order under this section"); *id.* § 1252(g) (stating that, except as provided in § 242 itself, courts lack jurisdiction to review "any cause or claim" arising from the Attorney General's decision or action "to commence proceedings, adjudicate cases, or execute removal orders"). Given this review scheme and § 1252(a)(2)(C)'s failure to specifically prohibit review of constitutional claims in the courts of appeals, *Webster* compels the conclusion that review of such claims should remain where it has always resided—in the courts of appeals on direct review. *See Webster*, 486 U.S. at 603.

Such a result, indeed, is the only one that makes sense of other provisions of the IIRIRA. 8 U.S.C. § 1252(b)(9), for example, provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

After requiring that *all* constitutional questions be heard in the court of appeals through review petitions, in light of the traditional axiom that specific statutes supercede general ones, this Court should look to § 1252(b)(9), not § 1252(a)(2)(C), for jurisdictional purposes.

B. Even Respondent Has Conceded The Merits Of This Argument.

For these reasons, Respondent has repeatedly argued that § 1252(a)(2)(C) cannot be understood to preclude review by the courts of appeals of substantial constitutional claims raised in direct review petitions.

Before the Ninth Circuit Court of Appeals, for example, Respondent recently argued that "to the extent that [a criminal alien] raises substantial constitutional issues, this Court retains jurisdiction to decide such issues and to address any potentially dispositive attendant statutory questions first." Br. of Resp. in *Cedano-Viera v. Ashcroft*, No. 01-70622, 2002 WL 32100095, at *30 (filed in 9th Cir. Jan. 29, 2002). Like Petitioner, Respondent cited *Webster v. Doe* for the proposition that "the Supreme Court [has] stated the general principle that jurisdictional statutes should not be construed to preclude judicial review of constitutional issues unless the statute says so explicitly," *id.* at *31, and observed that "Congress was well aware that aliens seeking review of their removal orders have often raised constitutional challenges to such orders by way of petitions for review in the Courts of Appeals." *Id.* at 31-32. Finally, Respondent argued that § 1252(a)(2)(C) must be read as ambiguous and therefore permitting review in light of *Calcano-Martinez*:

> The Supreme Court's statement in *Calcano-Martinez* that "the scope of [§ 1252(a)(2)(C)] is not entirely clear" and that "though the text of the provision is quite broad, it is not without its ambiguities" provides an express finding that [§ 1252(a)(2)(C)] is ambiguous rather than explicit in its treatment of constitutional questions. Especially in light of that ambiguity, [the court] should find that the

> presumption of reviewability emphasized by the Supreme Court in *Webster* and *St. Cyr* supports the argument that [§ 1252(a)(2)(C)] does not bar review of substantial constitutional questions in the courts of appeals.

Id. at *34 (internal citation omitted).

Respondent has, indeed, repeatedly advanced this argument in numerous courts, including this one. *See* Br. of Resp. in *Calcano-Martinez*, No. 00-1011, 2001 WL 327595, at *23-24 (filed in U.S. March 28, 2001); Br. of Resp. in *Huerta-Guevara v. Ashcroft*, No. 02-70454, 2002 WL 32102883, at *34 (filed in 9th Cir. Sept. 9, 2002); Br. of Resp. in *Nevarez-Martinez v. Ashcroft*, No. 02-70049, 2002 WL 32103295, at *12 n.3 (filed in 9th Cir. July 30, 2002); Br. of Resp. in *Garbutt v. Ashcroft*, No. 99-70002, 2001 WL 34095664, at *28-30 (filed in 9th Cir. Oct. 22, 2001); Br. of Resp. in *Chattoor v. Ashcroft*, No. 02-60087, 2002 WL 32254404, at *8-9 (filed in 5th Cir. Sep. 16, 2002); Br. of Resp. in *Bini v. Aljets*, No. 02-15101, 2002 WL 32180801, at *34 (filed in 8th Cir. Jan. 14, 2002).

Accordingly, this Court's review is necessary to correct the Third Circuit's error.

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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December 23, 2003

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 03-1877

JEAN MARIE LOUIS,
Petitioner

vs.

JOHN ASHCROFT, Attorney General
of the United States, Respondent

(Agency No. A72-550-854)

Present: NYGAARD, FUENTES AND
GREENBERG, CIRCUIT JUDGES

ORDER

The foregoing motion to dismiss the petition for review for lack of jurisdiction is granted. The petitioner, Jean-Marie Louis, seeks review of the BIA's February 26, 2003, decision in which it ordered Louis removed to Haiti after vacating a prior decision in which it had withheld his removal under the Convention Against Torture (CAT). Under 8 U.S.C. § 1252(a)(2)(C), "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" certain enumerated offenses, including an "aggravated felony." Our jurisdiction in a case falling under § 1252(a)(2)(C) is limited to determining "whether [the petitioner] is an alien, and whether he is removable by reason of having been convicted of one of the enumerated offenses." *Patel v. Ashcroft*, 294 F.3d 465, 468 (3d Cir. 2002). Louis does not dispute that he is an alien and that his state court conviction for possession with intent to distribute marijuana qualifies as an aggravated felony. Consequently, § 1252(a)(2)(C) "prohibits further adjudication of the petition for review and we must dismiss for lack of jurisdiction." *Patel*, 294 F.3d at 468.

Louis' argument that we can review his "removeability" under the CAT as part of our jurisdictional analysis under § 1252(a)(2)(C) is unavailing. *See Liang v. INS*, 206 F.3d 308, 322-23 (3d Cir. 2000). The holding in *Bosede v. Ashcroft*, 309 F.3d 441 (7th Cir. 2002), lends no support to Louis' position. *See Robledo-Gonzales v. Ashcroft*,— F.3d—, 2003 WL 21715838 at *9 (7th Cir. July 25, 2003) (noting, *inter alia*, that the *Bosede* "commentary on the availability of review for constitutional and statutory-interpretation questions was dicta"). As to Louis' contention that he was denied due process because he was not afforded notice of the proceeding on the motion to reopen the CAT claim, we have no jurisdiction over a criminal alien's "substantial constitutional claims" raised in a petition for review. *Liang*, 206 F.3d at 322. We see no basis for this panel to "revisit" *Liang* in light of *Calcano-Martinez v. INS*, 533 U.S. 348 (2001), or the other cases cited by Louis. *See Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1068-70 (9th Cir. 2003). For these reasons, the respondent's motion is granted and the petition for review is dismissed for want of jurisdiction. The request for a stay of removal is denied as moot. Louis may, of course, seek to pursue remedies, if any, that might be available on his claims through a 28 U.S.C. § 2241 petition filed in an appropriate district court.

By the Court,

/s/
Circuit Judge

Dated: Aug 22 2003

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-1877

JEAN MARIE LOUIS,

Petitioner

v.

JOHN ASHCROFT, Attorney General of the United States,

Respondent

On Appeal from the Board of Immigration Appeals
(No. A72-550-854)

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, and GREENBERG, Circuit Judges[1]

The Petition for rehearing filed [sic] the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for

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[1] Judge Greenberg's vote is limited to panel rehearing only.

rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered

By the Court,

/s/
United States Circuit Judge

DATE: Oct 3 2003

CPS-201

May 8, 2003

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 03-1877

JEAN MARIE LOUIS,
Petitioner

vs.

JOHN ASHCROFT, Attorney General
of the United States, Respondent

(Agency No. A72-550-854)

Present: NYGAARD AND FUENTES, CIRCUIT JUDGES

ORDER

The petitioner, Jean Marie Louis, is hereby directed to show cause, within ten (10) days of the date of this Order, why this Court should not dismiss his petition for review for want of jurisdiction. *See* 8 U.S.C. § 1252 (a)(2)(C) ("[N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section . . . 1227(a)(2)(A)(iii)."). The government may file a response to this jurisdictional issue within five (5) days after the filing of petitioner's response. A ruling on the motion for a stay of removal is held in abeyance pending consideration of the jurisdictional issue.

By the Court,

/s/
Circuit Judge

Dated: Jun 09 2003

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A72 550 854 - York Date: Feb 26 2003

In re: JEAN MARIE LOUIS

IN WITHHOLDING ONLY REMOVAL PROCEEDINGS UNDER SECTION 238 (b) of the ACT.

MOTION

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF SERVICE: Jeffrey T. Bubier
Assistant District Counsel

APPLICATION: Reopening

ORDER:

PER CURIAM. The Immigration and Naturalization Service moves the Board pursuant to 8 C.F.R. § 3.2 to reopen and vacate our previous decision dated October 24, 2001. The respondent has not replied to the motion. Although it is untimely, we will grant the motion to reopen *sua sponte*. *See Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997); 8 C.F.R. § 3.2(a).

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[1] The respondent's attorney did not formally enter his appearance with the Board through the filing of a Form EOIR-27, as required by 8 C.F.R. § 3.3(a)(2). Therefore, we must consider the respondent to be proceeding pro se. As a courtesy, however, we will send a copy of this decision to the attorney [illegible].

In our October 24, 2001, decision, we dismissed the Service appeal of the Immigration Judge's grant of withholding of removal under Article 3 of the Convention Against Torture (CAT), 8 C.F.R. § 208.16. Specifically, we found that the respondent, as a criminal returnee, had established that it is more likely than not that he would face torture upon return to Haiti. Subsequent to this Board's decision, *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002), was issued. In *Matter of J-E-*, *supra*, we determined that substandard prison conditions in Haiti do not constitute torture within the meaning of 8 C.F.R. 208.18(a) where there is no evidence that the authorities intentionally create and maintain such conditions in order to inflict torture. We find *Matter of J-E-*, *supra*, controlling here.

Accordingly, the motion is *granted*, the proceedings are reopened, and our previous decision dated October 24, 2001, is vacated. The Service appeal is sustained, the Immigration Judge's order is vacated and the respondent is ordered removed from the United States to Haiti.

/s/
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A72 550 854 - York Date: Oct 24 2001

In re: JEAN MARIE LOUIS

IN WITHHOLDING ONLY REMOVAL PROCEEDINGS UNDER SECTION 238 (b) of the ACT.

APPEAL

ON BEHALF OF RESPONDENT: Paul Buono, Esquire

ON BEHALF OF SERVICE: Jeffrey T. Bubier
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act
[8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony

APPLICATION: Withholding of removal; Convention Against Torture

In a decision dated February 6, 2001, an Immigration Judge denied the respondent's application for withholding of removal under section 241(b)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B), but granted him withholding of removal under Article 3 of the Convention Against Torture (CAT).[1] The Immigration and

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[1] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

Naturalization Service has appealed the grant of relief. The appeal will be dismissed.

The respondent is a 36-year old native and citizen of Haiti who was paroled into the United States on or about July 1, 1992. On May 3, 2000, the respondent was issued a Notice of Intent to Issue a Final Administrative Removal Order. He was charged with removability under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony under section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B) (drug trafficking crime). The charge was based on the respondent's May 25, 1999, conviction in Pennsylvania for possession with intent to deliver a controlled substance. A Final Administrative Removal Order was issued on June 19, 2000. The respondent's case was subsequently referred to an Immigration Judge after it was determined that he had a reasonable fear of persecution of torture.

At his hearing, the respondent testified that he was a member of Lavalas before Jean Bertand Aristide was elected to be President. The respondent had problems when the military overthrew Aristide in 1992. The respondent belonged to a neighborhood watch group, and one night there was an upheaval near his house. The respondent saw people shot and arrested, and he was arrested when he emerged from his home. The respondent was placed in a truck with others, and he subsequently escaped. He went into hiding for a short period and then fled to Cuba. He was subsequently paroled into the United States.

The respondent feared that he would be harmed by anti-Aristide forces if he returned to Haiti. He did not know who was the current President of Haiti, but feared harm because he did not believe that things ever changed that much in his country. He explained that he had recently read an Amnesty International report which stated that conditions in his country had not really improved. The respondent's parents and siblings still live in Haiti, but he has not spoken to them

since his 1992 departure. The respondent also feared being detained upon return to Haiti due to his status as a deportee.

The respondent was asked about his conviction, and he explained that he had been driving a "gypsy cab" and was hired to deliver a package. He was initially unaware of its contents, but upon arrest he learned that it contained marijuana. In its closing, the Service argued that the respondent did not meet his burden of proof for withholding of removal under section 241(b)(3)(B) of the Act or CAT.

The record contains the respondent's Application for Asylum and Withholding of Removal (Form I-589) (Exh. 4). There is also an article discussing 38 deportees who arrived in Haiti on March 24, 1999, and were taken into detention by Haitian authorities. Subsequent interviews revealed that the deportees were taken into custody to protect the public from potential criminal misbehavior. *See* Caitlin Montague, *Mistreatment of Criminal Deportees to Haiti* (August 25, 1999) <http://www.ciponline.org/caitlin.htm> (Exh. 6).

The Service submitted a Record of Deportable Alien (Form I-213), a record of conviction, a "memo to file" regarding the respondent's parole, and the *1999 Country Reports on Human Rights Practices, Haiti* (February 25, 2000), and the *Profile of Asylum Claims and Country Conditions, Haiti* (March 31, 1998), both issued by the Dept. of State's Bureau of Democracy, Human Rights and Labor (BDHRL) (*see* Group. Exh. 5). The *Country Reports* note that the Haitian government has a poor human rights record, and poor prison conditions, including food shortages, are a problem. *Profile* at 7. Further, police mistreatment of suspects occurs in all parts of the country, and reported forms of abuse include burning with cigarettes, choking, hooding, and severe boxing of the ears. *Id.* at 5.

The Immigration Judge found that the respondent was a credible witness, but that he did not meet his burden of proof for withholding of removal under section 241(b)(3)(B) of the

Act. He considered the current shift of power in Haiti, and the lack of any evidence that anyone would be interested in the respondent because of his former political activities.

The Immigration Judge did find that the respondent met his burden of proof for CAT relief. He considered that the documentary evidence in the record established that criminal deportees are detained upon arrival to Haiti, and that prisoners were subject to physical abuse. The Immigration Judge concluded that it was more likely than not that the respondent would face torture upon return to Haiti. The Immigration Judge also commented that he had heard from a State Department employee that criminal returnees were now being indefinitely detained, although he recognized that this information could [sic] was "outside the record" and not appropriate for consideration (*see* I.J. Dec. at 6-7).

Finally, the Immigration Judge concluded that based on the evidence of record and under the factors listed in *Matter of L-S-*, Interim Decision 3386 (BIA 1999), the respondent had not been convicted of a "particularly serious crime." *See* section 241(b)(3)(B) of the Act. The respondent was therefore granted withholding of removal under CAT.

The Service has appealed the finding [sic] the grant of CAT relief. It asserts that the respondent did not meet his burden of proof for CAT, and that the Immigration Judge impermissibly relied on evidence outside of the record to reach his decision. It points out that the on-line article in the record also states that some deportees arriving in Haiti have been directly released from the airport. *See* Exh. 6 at 2. Further, there was no other proof that returnees were subject to significant periods of detention.

The respondent has submitted a brief in support of the decision of the Immigration Judge. He additionally argues that the Immigration Judge's decision is supported by previously unavailable evidence, namely the *2000 Country*

Reports on Haiti, which was released by the BDHRL on February 26, 2001. It emphasizes the following statement:

> In the past, when the authorities received Haitian citizens deported from other countries for having committed crimes, they were processed in 1 week and then released. However, since March 24, criminal deportees who already have served sentences outside the country are kept in jail, with no timetable for their eventual release. Prosecutor Augustus Brutus said that "preventive measures" are being taken to prevent the "bandits" from increasing the level of insecurity and crime in the country.

Profile at 5. The report also states that "[p]olice mistreatment of suspects both at the time of arrest and during detention remains pervasive in all parts of the country." *Id.* at 4. Further, "[t]orture and other forms of abuse are pervasive." *Id.* Additionally, prison conditions remain "very poor" and this includes an inability to properly feed the prisoners. *Id.* at 5.

The Service has not replied to the respondent's argument and additional evidence. On review, we find that the Service appeal should be dismissed.

Initially, we address the Service's argument that the Immigration Judge erred in his final decision by considering what he "heard" from the State Department regarding the treatment of returnees to Haiti. We agree with the Service that this evidence had no place in the Immigration Judge's decision. Specifically, it was undocumented, and the Service was not given any opportunity to address or rebut the statement. Further, the evidence was not included in the record for appellate review. *See Matter of S-M-J-*, 21 I&N Dec. 722, 727-8 (BIA 1997) (explaining that any evidence relied upon by an Immigration Judge must be included in the record). Under these circumstances, the Immigration Judge should not have considered this evidence to any extent.

However, the Service was ultimately not prejudiced by this commentary as the record otherwise contains evidence to support the grant of CAT relief.

We next examine the issue of statutory eligibility for the requested forms of relief. The respondent has been convicted of an aggravated felony, which bars him from asylum. *See* section 208(b)(2)(B) of the Act, 8 U.S.C. § 1158(b)(2)(B). The respondent's aggravated felony conviction does not automatically bar him from withholding because he received a sentence of under 5 years. *See* section 241(b)(3)(B)(ii) of the Act, 8 U.S.C. § 1231(b)(3)(B)(ii) and final paragraph.[2] Rather, we examine the particulars of the crime to determine whether it is "particularly serious." *See Matter of S-S-*, Interim Decision 3374 (BIA 1999) (holding that in making this discretionary determination, we will use the analysis set forth in *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), *modified*, *Matter of C-*, 20 I&N Dec. 529 (BIA 1992), *Matter of Gonzalez*, 19 I&N Dec. 682 (BIA 1988)).

Relevant factors for this determination include the nature of the conviction, its circumstances and underlying facts, the sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the respondent is a danger to the community. *Matter of Frentescu*, *supra*, at 247. Crimes against persons are more likely to be categorized as particularly serious, but there may be instances where crimes against property will be considered to be particularly serious. *Id.* Further, once an alien is found to have committed a particularly serious crime, there is no need for a separate determination to address whether the

---

[2] We clarify that if a respondent is barred from withholding of removal due to a conviction for a particularly serious crime, he or she is also barred from withholding of removal based on CAT. *See* 8 C.F.R. § 208.16(d)(2). However, the alien may still be considered for deferral of removal under CAT. *See* 8 C.F.R. § 208.17.

alien is a danger to the community. *See Matter of Q-T-M-T-*, 21 I&N Dec. 639, 646-7 (BIA 1996).

The conviction records show that the respondent was convicted of possession for sale, and that he received 11 ½ to 23 months of incarceration. *See* Group Exh. 5B. The respondent testified that his crime involved marijuana, and resulted from him unwittingly delivering a single package when he was driving a "gypsy cab." We recognize the seriousness of drug-related crimes, especially those involving distribution. However, under the circumstances before us, we do not find that the respondent's crime should be labeled "particularly serious." We point out that there was no evidence about the amount of marijuana involved in this crime, and that it appears to have been an isolated incident. Further, the Service did not argue that the crime was particularly serious during the hearing (*see* Tr. at 25, 28-29), and it did not raise the issue on appeal. We therefore conclude that the respondent is not barred from relief under section 241(b)(3)(B) of the Act.

We now address the merits of the respondent's claim. At the time of the Immigration Judge's decision, the record established that the Haitian government was in the practice of detaining criminal deportees, and that detainees were subject to physical abuse and that prison conditions were deplorable. Even if this evidence was not strong enough to support a grant, the respondent now offers additional evidence which meets his burden of proof.

The Board generally does not consider evidence first submitted on appeal. However, the particular circumstances of this case, [sic] we find that such consideration is appropriate. We point out that the evidence was not available at the time of the Immigration Judge's decision, and it is material as it goes to the heart of the respondent's CAT claim. Further, the evidence is from the State Department, a source that it is recognized as highly reliable. *See Matter of V-T-S-*, 21 I&N Dec. 792, 799 (BIA 1997)

(internal cites omitted). Lastly, the Service has been apprized of the recent Country Report, and has offered no rebuttal arguments against its consideration by the Board. Under these circumstances, we find it fair and reasonable to consider the evidence at this juncture in the proceedings.[3] *Cf. Janusiak v. INS*, 947 F.2d 46 (3rd Cir. 1991) (approving the Board's use of administrative notice when denying the respondent's asylum claim).

We conclude that the evidence before us establishes that criminal returnees are being indefinitely detained upon return to Haiti,[4] and that the country has an established record of the serious mistreatment of detainees and prisoners. This evidence is sufficient to establish that it is more likely than not that the respondent will face torture upon return to Haiti. *See* 8 C.F.R. § 208.16(c). Accordingly, the grant of relief will remain undisturbed.

ORDER: The appeal of the Immigration and Naturalization Service is dismissed.

/s/
FOR THE BOARD

---

[3] We also consider the futility of returning the record when the Immigration Judge previously found the evidence of record sufficient to support a CAT grant of relief.

[4] This information quells the Service's concern that the evidence of record did not establish that all returnees were detained, or how long they were detained.

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
York, Pennsylvania

File No.: A 72 550 854 February 6, 2001

In the Matter of

JEAN MARIE LOUIS,	)	WITHHOLDING ONLY
	)	REMOVAL PROCEEDINGS
Respondent	)	UNDER SECTION 238

CHARGE:

APPLICATION: Withholding of removal and Convention Against Torture.

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Pro se	Jeffrey Bubier, Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 34-year-old single male alien, native and citizen of Haiti, who was paroled in the United States in 1992 pursuant to Section 212(d)(5) for humanitarian reasons. On June 19th of 2000, the District Director of the Immigration and Naturalization Service issued an administrative order of removal against the respondent due to an "aggravated felony" conviction. In order to avoid removal, the respondent communicated to the Service he had a fear of being persecuted or tortured upon being removed to Haiti. As a consequence, he was directed to an asylum officer of the Immigration and Naturalization Service, who found that the respondent's testimony was credible. He found a reasonable fear of persecution was established and he then referred Mr. Louis to this Court for adjudication of

his Form I-589. The respondent appeared in Court today pro se and testified in support of that application.

Respondent testified that he departed Haiti in April or so of 1992 and went to Cuba and remained there for a short period of time and then was paroled into the United States in July of 1992. He testified he has a high school equivalent diploma and he worked as a bus driver for about eight years, driving a city bus in Port au Prince.

He testified that in 1989 he joined the Lavalas party, which as the Court knows is a political party who supported the presidency of Father Jean Batiste Aristide, who was a Roman Catholic priest at the time. In fact, Father Aristide was elected president in the early part of 1990. However, he lost his presidency when he was ousted by a military coup, which installed Raul Cedras as the interim head of the Haitian government. Respondent testified that he was a community volunteer for the Lavalas party and recruited members, doing whatever was necessary locally in assisting in the clean-up of the neighborhood, in social services-type activities. He became fearful for his life when President Aristide was ousted from office and had to flee to the United States for protection. The military regime at that point then starting [sic] attacking Lavalas supporters. He testified to a certain extent about that. Also, he testified he was arrested at one point, but was able to immediately escape. The Court notes that nowhere in his withholding of removal application did the respondent refer to him being arrested. Nonetheless, the respondent testified as to a lot of violence perpetrated by the military regime against Lavalas supporters and he departed Haiti in 1992 to avoid a like or similar treatment.

He testified that he last heard from his parents and siblings when he departed Haiti and has no communication with them since that time. The reasons for that are essentially unclear, but I think the Court heard that his parents were renters in an apartment or a house and did not own the place and so they may have moved on and he has had no way to find out where

they are. He also testified that he has a fear of returning to Haiti.

In this regard, he testified that he fears returning to Haiti because of his past political activities in support of and as a member of the Lavalas party. He has read Amnesty International reports recently indicating there is still a lot of violence and that the police and military essentially commit human rights abuses and that he feels upon his return he would be treated in like fashion. He denied any knowledge of who was president of Haiti. When the Court pointed out that President Aristide has, in fact, been re-elected President of Haiti, he expressed that President Aristide will probably be killed anyway and that there will be a cycle of violence ensued [sic] like he experienced in the past, which led him to depart his native country. He also testified that it is his knowledge that upon his return he will be imprisoned and kept there as a long term detainee and that, according to his written application, he will be tortured during that time.

The Court has applied the standards for withholding of removal as set forth in the decision of *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). Further, the respondent's testimony has been found to be credible. To that extent, the Court finds that respondent has made no attempt to mislead the Court in any material fashion concerning the reasons he left Haiti and the reasons he has a genuine fear of returning. While the Court believes that respondent has a genuine fear of being persecuted upon his return to Haiti, the Court finds there is no evidence to support his claim in this regard.

That is, the very person respondent worked with the Lavalas party to support in 1992, Jean Batiste Aristide, has once again been elected President of Haiti by an overwhelming support of the population of Haiti. The Court seriously doubts that being a former Lavalas or Aristide supporter would cause him to be singled out for persecution upon his return there. As Service counsel pointed out, the documentary evidence in this case, particularly the

Department of State *Country Reports* and *Profiles* do not corroborate the respondent's claim of any persecution on account of his past political activities. Quite frankly, the Court is of the opinion that no one knows of the respondent's existence nor will they care about his past political activities once he is returned to Haiti. Consequently, the Court will deny the respondent's application for withholding of removal under Section 241(b)(3) of the Immigration and Nationality Act.

Further considered is a tandem application of the respondent's claim under Article III of the *Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, which became effectively binding on the United States on November 20th of 1994 after the Senate adopted its advice and consent to ratification four years earlier. In February 1999, the Attorney General of the United States implemented interim regulations on the Torture Convention, published in the Federal Register at 8 C.F.R. Part III. These regulations establish the procedures for raising a claim for protection under Article III of the Convention Against Torture, which prohibits the return of an alien to a country where there are substantial grounds for believing he would be in danger of being subjected to torture. The Court has further considered the Board's recent decision in *Matter of S-V-*, Int. Dec. 3430 (BIA 2000), in this regard, which examined various of the regulations implementing the torture convention, setting forth therein the burden of proof the respondent must meet in order to be granted this relief. See also 8 C.F.R. Section 208.16(c)(2). The Court notes that the definition of "torture" is set forth at 8 C.F.R. Section 208.18(a)(1) and thereunder, which the Court will not repeat here.

It is essentially the respondent's contention in this later regard, or at least what the Court will discern respondent is stating, that as a returning deportee to Haiti, he will be subjected to torture as defined under Article I of the Act, as

reflected in Article III and as set forth in implementing Federal Regulations. To the extent that the respondent fears being detained, it does appear that that will almost certainly be the case. The Court is aware of the Amnesty International Report that the respondent referred to, although it is not of this record today. The Court has also attached what has been marked as Court Exhibit 6 in this regard, essentially confirming that criminal deportees to Haiti are automatically detained upon their arrival. The questions of how long they are detained and what will happen to them while they are detained are not reflected in this document.

Although also not reflected in this document, the Court is aware in this regard that the official at the Department of State responsible for Haiti, in other words the officer at the "Haitian desk", has informed the Court outside this record and not pertaining to this particular case, that he confirmed with the Haitian Consul General to the United States, that it is a policy of the Haitian government to, in fact, detain all criminal deportees and that it is the opinion of this State Department official that that is done because due to a great fear on the part of the Haitian government that criminals being deported from the United States, particularly those with no family ties and no job prospects, which covers virtually all of them, will just contribute to or increase the level of criminal activity in Haiti and so they are kept in a detained status.

As noted however, we have no information in this particular record of the treatment of criminal deportees to Haiti. That being the case, the Court must presume that they are treated in like fashion as any other Haitian citizen of being suspected of a crime and held in a detained or imprisoned status. To this extent, the Court will take cognizance of the Department of State's *Country Reports* appended to the record at group Exhibit 5-D and also to a lesser extent, the *Country Profiles*, which is now about three years old, and given Haiti, is almost ancient history. In any

event, the knowledge that the Court has that the respondent would be, in fact, detained, in conjunction with the evidence or the information set forth by the Department of State in this *Country Report*, leaves the Court no alternative but to find that there is the likelihood that he would be subjected to physical mistreatment, including torture, upon his return. Again, the Court has to consider the evidence or the information in the Department of State *Report* in a general fashion and then try to make every attempt in good faith to place it in the context of the respondent's situation. Again, being deported as a criminal to Haiti, he is certainly not going to be welcomed with open arms by the Haitian government. The *Country Reports* do entail the physical abuse of detainees, as well as those in prison, as set forth clearly in the *Country Reports*, including choking, damage to the ear drums, electric shocks, beatings with fists, sticks and belts, etc.

The respondent does not have the burden of proof to show that he will absolutely be subjected to torture upon his return. He need only show that there is a clear likelihood of being subjected to such conditions that constitute torture, upon his return. The Court Exhibit 6, as well as group Exhibit 5-D in this case, leads the Court to conclude that the respondent has met his burden of proof in this case in this matter [sic].

The respondent was questioned concerning his criminal conviction. He pleaded not guilty to the offense of possession with intent to distribute marijuana. He was found guilty by a jury trial and sentenced to 11 1/2 to 23 months, I believe it was, for that offense. The Court is unaware of exactly how much time he did serve for that. The Court cannot consider the fact that the respondent has denied any criminal culpability. The Court must presume that he, at least, is legally guilty because that is in the evidence of record, if not, in fact, factually guilty. It is the respondent's burden to show that this offense was not a particularly serious crime. To this extent, the Court has applied the

standard as set forth by the Board in its decision in the *Matter of L-S-*, Int. Dec. 3386 (BIA 1999). The Court is unaware of exactly what amount of the marijuana involved in this case is, but after taking into consideration the respondent's testimony, absent his professed factual culpability, the Court is going to find that this is not a "particularly serious crime."

This finding is important in relation to the respondent's Convention Against Torture application, in that the Court must decide whether to grant him withholding of removal under Section 241(b)(3) and under the auspices of Article III of the Torture Convention, or deferral of removal as set forth at 8 C.F.R. Section 208.17(a). As the Court has not found the respondent to have been convicted of a particularly serious of [sic] crime, withholding of removal is mandatory in this case, under Article III and the Court will, after considering all of the evidence of this record, grant that relief to him.

Accordingly, based upon the foregoing the following orders are entered.

ORDER

Respondent's application for withholding of removal under Section 241(b)(3) is hereby denied.

ORDER

Respondent is hereby ordered removed from the United States in accordance with his administrative order of removal.

FURTHER ORDER

Respondent's order of removal as to Haiti is hereby withheld under Article III of the Torture Convention.

/s/
WALTER A. DURLING
Immigration Judge

I hereby certify that the attached proceeding before WALTER A. DURLING, in the matter of:

JEAN MARIE LOUIS

A 72 550 854

York, Pennsylvania

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/
(Tracy Robertson, Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

March 11, 2001
(Completion Date)

IMMIGRATION COURT
3434 CONCORD ROAD
YORK, PA 17402

In the Matter of:	Case: A72-550-854
LOUIS, JEAN MARIE	
Applicant	IN WITHHOLDING-ONLY PROCEEDINGS
On behalf of the Applicant	On behalf of the INS
Pro se	

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on February 6, 01 and is issued solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

ORDER: It is hereby ordered that the applicant's request for:

[X] 1. Withholding of Removal under INA 241(b)(3) is:

[ ] Granted

[ ] Withdrawn

[X] Denied

[X] 2. Withholding of Removal under Convention Against Torture is:

[X] Granted

[ ] Withdrawn

[ ] Denied

[ ] 3. Deferral of Removal under the Convention Against Torture is granted.

Date:

/s/
WALTER A. DURLING
Immigration Judge

APPEAL: WAIVED
APPEAL DUE BY: MARCH 8, 01

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:

MAIL (M) (PERSONAL SERVICE (P))

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer

[ ] ALIEN'S ATT/REP [ ] INS

DATE: /s/

BY: COURT STAFF _____

Attachments: [ ] EOIR-33 [ ] EOIR-28

[ ] Legal Services List [ ] Other

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JEAN MARIE LOUIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 03-187[illegible]**
	)	**INS No. A72 550 854**
JOHN ASHCROFT,	)	
Attorney General,	)	
	)	
Respondent.	)	
	)	

RESPONDENT'S MOTION TO DISMISS PETITION FOR REVIEW FOR LACK OF JURISDICTION, AND REQUEST TO HOLD BRIEFING IN ABEYANCE

In response to the Petitioner's June 19, 2003 response to this Court's order to show cause, the Respondent, Attorney General John Ashcroft, submits this motion to dismiss Jean Louis's petition for review because the Court lacks subject matter jurisdiction.

* * *

ARGUMENT

I. BECAUSE LOUIS WAS CONVICTED OF A DRUG TRAFFICKING OFFENSE, AN AGGRAVATED FELONY, COVERED IN SECTION 237(a)(2)(A)(iii) OF THE INA, THE COURT LACKS JURISDICTION AND MUST DISMISS THE PETITION FOR REVIEW.

Judicial review of final orders of removal is conducted pursuant to section 242 of the INA, 8 U.S.C. § 1252. *See*

INA § 242(a), 8 U.S.C. § 1252(a). Subsection 242(a)(2)(C) provides:

> ORDERS AGAINST CRIMINAL ALIENS. - Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

The Court lacks jurisdiction over Louis's case because Congress explicitly barred judicial review of a removal order based on an aggravated felony, covered in section 237(a)(2)(A)(iii) of the INA, 8 U.S.C. § 1227(a)(2)(A)(iii). This conclusion is supported by the Supreme Court's decision in *Calcano-Martinez v. INS*, 533 U.S. 348, 349 (2001), which held that section 242(a)(2)(C) of the INA, 8 U.S.C. § 1252(a)(2)(C), "fairly explicitly strips the courts of appeals of jurisdiction" to consider petitions for direct review of final removal orders filed by aliens convicted aggravated [sic] felony offenses, which includes the drug trafficking offense committed by Louis. *Id.* Consistent with *Calcano-Martinez*, this Court held in *Patel v. Ashcroft*, 294 F.3d 465 (3d Cir. 2002), that section 242(a)(2)(C) of the INA, 8 U.S.C. § 1252(A)(2)(c), divests circuit courts of jurisdiction to review petitions filed by aliens convicted of enumerated offenses. Louis does not dispute that he is an alien convicted of an aggravated felony. Thus, the jurisdictional bar applies.

Moreover, Louis cannot overcome this jurisdictional bar. First, while the government agrees that this Court should revisit its holding in *Liang v. INS*, 206 F.3d 308 (3d Cir.

2000), that the courts of appeals do not retain jurisdiction to review substantial constitutional claims raised in a petition for review by an alien convicted of an aggravated felony, Louis has raised no such claim here.

* * *

CONCLUSION

For the foregoing reasons, the Court must dismiss the petition for review for lack of jurisdiction. The Attorney General requests that the Court hold briefing on the merits in abeyance pending disposition of this motion.

Respectfully submitted,
ROBERT D. McCALLUM, JR.
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United States Department of Justice
Civil Division

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/s/
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Dated:
June 25, 2003

Supreme Court, U.S.
FILED
MAR 2 4 2004
OFFICE OF THE CLERK

(2)

No. 03-909

In the Supreme Court of the United States

JEAN MARIE LOUIS, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
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Counsel of Record

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Assistant Attorney General

DONALD E. KEENER
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BEST AVAILABLE COPY

QUESTION PRESENTED

Under 8 U.S.C. 1252(a)(2)(C), "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense" enumerated in certain provisions of Title 8 of the United States Code. The question presented is whether a court of appeals has jurisdiction to consider a "substantial constitutional challenge" to a removal order when the alien is removable by reason of having committed a criminal offense enumerated in Section 1252(a)(2)(C).

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In the Supreme Court of the United States

No. 03-909

JEAN MARIE LOUIS, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The order of the Board of Immigration Appeals (Pet. App. 6a-7a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2003. A petition for rehearing was denied on October 3, 2003 (Pet. App. 3a-4a). The petition for a writ of certiorari was filed on December 23, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress enacted a number of immigration-reform measures. One is codified in 8 U.S.C. 1252(a)(2)(C), which provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense" covered in certain sections of Title 8 of the United States Code. An "aggravated felony" is a criminal offense covered in one of the sections mentioned in Section 1252(a)(2)(C)—namely, 8 U.S.C. 1227(a)(2)(A)(iii). The term "aggravated felony" is defined in 8 U.S.C. 1101(a)(43) and includes certain drug crimes. See 8 U.S.C. 1101(a)(43)(B).

This Court interpreted Section 1252(a)(2)(C) in two decisions issued on the same day in 2001. One of those cases, *INS* v. *St. Cyr*, 533 U.S. 289, holds that Section 1252(a)(2)(C) has no effect on a district court's habeas corpus jurisdiction under 28 U.S.C. 2241. The other case, *Calcano-Martinez* v. *INS*, 533 U.S. 348, holds that Section 1252(a)(2)(C) deprives a court of appeals of jurisdiction to review an administrative determination that an alien is ineligible for a discretionary waiver of deportation. In *Calcano-Martinez*, the Court noted, but had no occasion to address, the question whether Section 1252(a)(2)(C) deprives a court of appeals of jurisdiction to review a "substantial constitutional challenge" raised by a covered alien. 533 U.S. at 350 n.2.

2. Petitioner is a Haitian citizen who was paroled into the United States for humanitarian reasons in 1992. On May 25, 1999, petitioner was convicted in a Pennsylvania court of possession with intent to deliver

a controlled substance, an aggravated felony. On May 3, 2000, the Immigration and Naturalization Service (INS) initiated administrative removal proceedings.[1] On June 19, 2000, the District Director of the INS sustained the charge of removability and issued an order of removal. Pet. App. 9a, 16a.

Petitioner requested protection from removal on the ground that he faced persecution and torture if returned to Haiti. On February 6, 2001, an Immigration Judge (IJ) ordered petitioner removed, but withheld removal under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984). Pet. App. 8a, 16a, 22a-23a.

The INS appealed the IJ's decision to the Board of Immigration Appeals (BIA). On October 24, 2001, the BIA dismissed the INS's appeal. It concluded that the evidence established that criminal returnees were being indefinitely detained upon their return to Haiti, which had an established record of mistreating detainees and prisoners. The BIA therefore held that the evidence was sufficient to establish a likelihood that petitioner would face torture if returned to Haiti. Pet. App. 8a-9a, 14a-15a.

3. On November 29, 2002, the INS filed with the BIA a motion to reopen petitioner's removal proceeding. The motion requested that the BIA vacate its decision based on a material change in the law. In particular, the INS argued that the rationale for the

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[1] Certain functions of the INS have since been transferred to the Department of Homeland Security and assigned to United States Immigration and Customs Enforcement. See 6 U.S.C. 251(2).

decision—that a deported criminal alien was likely to suffer torture by being detained in a Haitian jail—had been rejected by the BIA in an intervening en banc decision. That decision, *In re J-E-*, 23 I. & N. Dec. 291 (2002), holds that substandard prison conditions in Haiti do not constitute torture under the relevant INS regulation when there is no evidence that the authorities intentionally created and maintained those conditions in order to inflict torture. Admin. R. 15-18.

On November 19, 2002, INS counsel mailed its motion to reopen both to petitioner and to the attorney who represented him before the BIA at the addresses on file with the INS. On December 11, 2002, the BIA separately sent notice of the INS's motion to petitioner and his counsel at their addresses on file with the BIA. Neither petitioner nor his counsel responded to the motion to reopen. Admin. R. 13-14, 18.

On February 26, 2003, the BIA issued an order in which it concluded that the INS's motion to reopen was untimely but granted the motion *sua sponte*. Finding its decision in *In re J-E-* controlling, the BIA vacated its previous decision and ordered petitioner removed from the United States to Haiti. On the same day, the BIA mailed a copy of the order to petitioner at a new address. Pet. App. 6a-7a; Admin. R. 1.

4. Petitioner did not file a motion to reconsider with the BIA. Instead, he filed a petition for review of its order in the court of appeals. On June 9, 2003, the court issued an order to show cause why the petition should not be dismissed for want of jurisdiction under 8 U.S.C. 1252(a)(2)(C). Pet. App. 5a.

On August 22, 2003, after receiving submissions from the parties, the court dismissed the petition for review in an unpublished order. Jurisdiction in a case falling under Section 1252(a)(2)(C), the court held, is limited to

determining whether the petitioner is an alien and whether he is removable by reason of having been convicted of one of the enumerated offenses, and petitioner conceded that the answer to both questions is yes. The court declined to consider petitioner's claim that he had been denied due process because he was not given notice of the BIA proceeding on the motion to reopen. The court held that it had no jurisdiction over a criminal alien's "substantial constitutional claims," and declined petitioner's invitation to revisit the decision that established that principle, *Liang* v. *INS*, 206 F.3d 308, 322 (3d Cir. 2000), cert. denied, 533 U.S. 949 (2001). Pet. App. 1a-2a.

ARGUMENT

Petitioner contends that 8 U.S.C. 1252(a)(2)(C) does not preclude, on direct review of an order of removal, a court of appeals' exercise of jurisdiction over "substantial constitutional challenges." Pet. 8-21. He contends that the Third Circuit's contrary interpretation of Section 1252(a)(2)(C) is erroneous (Pet. 18-21); that its interpretation conflicts with that of other courts of appeals (Pet. 8-15); and that the interpretive question is one of great importance (Pet. 15-18). While the government agrees with petitioner that Section 1252(a)(2)(C) does not deprive a court of appeals of jurisdiction to review a substantial constitutional claim, and while there does appear to be a circuit conflict on that issue, it is not clear that the issue is sufficiently important to justify this Court's intervention, and even if it were, this case would not be an appropriate vehicle. Further review is therefore unwarranted.

1. By preserving aliens' ability to raise certain legal challenges to an order of removal through a petition for a writ of habeas corpus if they cannot be raised in a

petition for direct review in the court of appeals, this Court's decision in *St. Cyr* has greatly diminished the significance of the issue in this case. In light of *St. Cyr*, the question raised in the petition, as a practical matter, is not *whether* there can be judicial review of substantial constitutional claims, but only *where* there can be judicial review of such claims. In the Seventh, Eighth, and Eleventh Circuits, such claims may be reviewed in the court of appeals, on direct review of an order of removal. See, *e.g.*, *Robledo-Gonzales* v. *Ashcroft*, 342 F.3d 667, 676-681 (7th Cir. 2003); *Balogun* v. *Attorney General*, 304 F.3d 1303, 1305 (11th Cir. 2002); *Vasquez-Velezmoro* v. *INS*, 281 F.3d 693, 696 (8th Cir. 2002). In the Third and Ninth Circuits, such claims must be brought in the district court, in a petition for a writ of habeas corpus. See, *e.g.*, *Cedano-Viera* v. *Ashcroft*, 324 F.3d 1062, 1067-1070 (9th Cir. 2003); *Liang*, 206 F.3d at 322-323. Since there is no circuit in which an alien challenging an order of removal is categorically foreclosed from obtaining judicial review of a substantial constitutional claim, it is not clear that the procedural question in this case—which, in practical terms, is whether such a claim is to be brought in the district court or the court of appeals—is sufficiently important to justify the exercise of this Court's certiorari jurisdiction at this time.

2. Even if the question were deserving of the Court's attention, this case would not be an appropriate vehicle for deciding it, because the court of appeals would lack jurisdiction regardless of whether the Court adopted the rule that petitioner advocates. As explained in more detail below, that is true for two independent reasons. First, because petitioner never presented his constitutional claim to the BIA, he has failed to exhaust administrative remedies. Second,

even if it is true that petitioner did not receive notice of the INS's motion to reopen, the BIA did not violate due process by *sua sponte* vacating its initial decision without notice, and petitioner thus has no substantial constitutional challenge to bring, both because he could have filed a motion to reconsider with the BIA and because any lack of notice had no effect on the outcome.

a. According to petitioner, subsection (a) of 8 U.S.C. 1252 does not deprive a court of appeals of jurisdiction to review a substantial constitutional challenge to an order of removal. Section 1252, however, also has a subsection (d), which provides, in part, that "[a] court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)(1). This provision has uniformly been interpreted to mean that a claim of procedural error, even one of constitutional dimension, has not been exhausted if the asserted error could have been corrected by the BIA but the claim was not raised there. See *Silva-Calderon* v. *Ashcroft*, 358 F.3d 1175, 1178-1179 (9th Cir. 2004) (citing cases from other circuits). Section 1252(d) has also been uniformly interpreted to mean that a failure to exhaust administrative remedies deprives a court of appeals of subject matter jurisdiction to consider the claim in question. See *Barron* v. *Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004) (citing cases from other circuits).

The asserted error in this case—an alleged lack of notice to petitioner before the BIA vacated its prior decision[2]—could have been raised in the BIA, and cor-

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[2] There has never been any finding that petitioner did not receive notice of the INS's motion to reopen. And the only concrete evidence of lack of notice is the fact that the copy of the motion to reopen that was served on petitioner's counsel by the INS was

rected by it, through the mechanism of a motion to reconsider. See 8 C.F.R. 1003.2(b) (authorizing such a motion within 30 days of BIA decision when the decision is based on an "error[] of fact or law"). Since petitioner did not file such a motion, he failed to exhaust his administrative remedies. See, *e.g.*, *Gonzalez-Torres* v. *INS*, 213 F.3d 899, 903-904 (5th Cir. 2000) (no exhaustion where claim was not raised on appeal to BIA and alien did not file motion to reconsider). Cf. *Bernal-Vallejo* v. *INS*, 195 F.3d 56, 63-64 (1st Cir. 1999) (no exhaustion where due process claim based on ineffective assistance of counsel was not raised on appeal to BIA and alien did not file motion to reopen); *Liu* v. *Waters*, 55 F.3d 421, 424-426 (9th Cir. 1995) (same). The court of appeals would therefore be without jurisdiction to consider petitioner's claim even if this Court concluded that Section 1252(a)(2)(C) is not a bar to consideration of substantial constitutional claims.

b. The court of appeals would also lack jurisdiction even if petitioner had not failed to exhaust administrative remedies, because he has no substantial constitutional challenge to bring. That is true for two separate reasons.

i. In his response to the court of appeals' order to show cause, petitioner contended that his principal claim of unconstitutionality was that he "received no notice of the proceeding [on the motion to reopen] and no opportunity to be heard in it, as due process requires." Response to Ord. to Show Cause 15. To support that claim, petitioner quoted (*ibid.*) the Third Circuit's observation in another case that, "[i]n the

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returned to sender. Response to Ord. to Show Cause Exh. B. Petitioner simply asserts that he did not receive the copies that were served on him. Pet. 5.

context of an immigration hearing, due process requires that 'aliens threatened with deportation are provided the right to a full and fair hearing' that allows them 'a reasonable opportunity to present evidence' on their behalf." *Abdulrahman* v. *Ashcroft*, 330 F.3d 587, 596 (2003) (quoting *Sanchez-Cruz* v. *INS*, 255 F.3d 775, 779 (9th Cir. 2001)). The proceeding in question in this case, however, was not an immigration hearing, much less one at which an IJ heard evidence, and then found facts, without giving petitioner the opportunity to cross-examine witnesses and present evidence of his own. It was, instead, a proceeding on a motion to reopen an appeal, in which the BIA addressed a single issue of law: whether, in light of the BIA's intervening en banc decision in *In re J-E-*, the facts found by the IJ constitute torture under the applicable regulation. Since the BIA is "an appellate body" that "will not engage in factfinding," 8 C.F.R. 1003.1(d)(1) and (d)(3)(iv), the constitutional principle on which petitioner relied is inapposite.

While petitioner would have been able to raise a substantial constitutional claim if the IJ had adjudicated his rights without giving him an opportunity to challenge the government's evidence and present his own, the BIA's *sua sponte* decision to vacate its prior decision on a pure question of law without providing notice (if that is what happened) does not present a substantial constitutional question. In the latter circumstance, unlike the former, an alien can simply file a motion to reconsider in which he argues that the BIA's conclusion of law was erroneous. See 8 C.F.R. 1003.2(b)(1). For a proceeding of the kind at issue here, that procedure provides a full and fair opportunity to present one's views. See *In re Weinstein*, 164 F.3d 677, 686-687 (1st Cir.) (*sua sponte* reversal of original decision without

notice does not violate due process, because, among other things, argument could have been raised in motion for reconsideration), cert. denied, 527 U.S. 1036 (1999). And since any lack of notice does not present a substantial constitutional question, the court of appeals would have lacked jurisdiction even if it had interpreted Section 1252(a)(2)(C) as petitioner urges.

ii. An alien who challenges an administrative procedure "cannot prove a due process violation in the absence of substantial prejudice." *Patel* v. *Attorney General*, 334 F.3d 1259, 1263 (11th Cir. 2003). Accord, *e.g.*, *Anwar* v. *INS*, 116 F.3d 140, 144-145 (5th Cir. 1997). That is the case here. Even if petitioner had a right to notice before the BIA vacated its initial decision, and even if that right was violated, petitioner was not prejudiced by the violation, because there is no reason to believe that the BIA would have reached a different conclusion if it had had the benefit of petitioner's views.

In its initial decision, the BIA held that substandard prison conditions in Haiti constituted torture under the applicable regulation. Pet. App. 14a-15a. Approximately five months later, the en banc BIA held in *In re J-E-* that such conditions do *not* constitute torture unless the authorities have intentionally created and maintained the conditions in order to inflict torture. 23 I. & N. Dec. at 294-304. Since there is no evidence in the record that Haitian authorities have done so, the holding of *In re J-E-* plainly covers this case. And since the BIA "may at any time reopen or reconsider on its own motion any case in which it has rendered a decision," 8 C.F.R. 1003.2(a), the BIA had the authority to reopen the case *sua sponte* when it did (approximately 16 months after its initial decision). Under these circumstances, there is every reason to believe that the

result "would have been the same in the absence of the alleged procedural deficiencies." *Patel*, 334 F.3d at 1263. Accordingly, petitioner cannot show substantial prejudice, he cannot show a violation of due process, and he cannot show that he has a substantial constitutional claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

No. 03-909

IN THE

Supreme Court of the United States

JEAN MARIE LOUIS,

Petitioner,

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

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This petition asks the Court to clarify whether federal courts of appeals have jurisdiction to consider substantial constitutional challenges to a Board of Immigration Appeal's ("BIA's") final removal order where the petitioner is a "criminal alien"—an alien removable based on a criminal conviction enumerated in 8 U.S.C. § 1252(a)(2)(C). As demonstrated in the petition (Pet. 8-15), there is a deep and persistent circuit split on this issue: the Ninth and Third Circuits have concluded that jurisdiction does not exist, while the Seventh, Eighth and Eleventh Circuits, as well as the Executive Branch of the United States, have reached the opposite conclusion. As the petition further showed (Pet. 13, 17-18, 18-21), the judicial conflict should not be allowed to persist given the significant differences between direct and habeas review and the procedural disuniformity the split is causing.

Importantly, respondent largely *concedes* these arguments. It agrees "that Section 1252(a)(2)(C) does not deprive a court of appeals of jurisdiction to review a substantial constitutional claim" and that the Third Circuit's contrary interpretation of § 1252(a)(2)(C) is erroneous. Opp'n 5. It further recognizes that "there does appear to be a circuit conflict on that issue." *Id.* Respondent contends, however, that the question presented is not "sufficiently important to justify this Court's intervention" and that this case is not "an appropriate vehicle" for reviewing it. *Id.* at 5. These arguments are demonstrably wrong.

I. THE PETITION RAISES A SIGNIFICANT JURISDICTIONAL QUESTION.

Respondent's principal argument (Opp'n 5-6) is that the significance of the question presented has "greatly diminished" since the Court issued its decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). According to respondent, because *St. Cyr* holds that criminal aliens may file a petition for a writ of habeas corpus, the only issue presented is *where* the alien

must file, not *whether* judicial review is available. Opp'n 6. But respondent's argument ignores both the real differences between habeas and direct review and the deleterious effects of non-uniformity in the lower courts. Indeed, the argument fails to acknowledge that a federal question about the jurisdiction of the lower courts is by *necessity* a substantial legal issue.

First, contrary to respondent's argument (Opp'n 6), the question presented concerns more than simply where aliens should file. Rather, as explained in the petition (Pet. 15), the question presented impacts the scope of review available to criminal aliens, whether the alien must be "in custody" to receive judicial review (*id.* at 16), and the speed with which aliens can receive a final determination of their constitutional claims (*id.*)—all of which are of tremendous practical importance to aliens and the government alike. Indeed, the Executive Branch itself has repeatedly asked (including in the proceeding below) the Third and Ninth Circuits to reconsider their interpretation of § 1252(a)(2)(C) and exercise jurisdiction over the substantial constitutional claims of criminal aliens. Pet. 13-14. Notwithstanding respondent's convenient denials here, the question presented is obviously one of great practical and legal significance.

Second, respondent has not, and cannot, deny that the courts of appeals' divergent interpretations of their jurisdiction under § 1252(a)(2)(C) has caused them to adopt non-uniform procedures governing review of a criminal alien's substantial constitutional claims. Pet. 16-17. Yet procedural uniformity and efficient judicial administration, in and of themselves, are of substantial practical importance to the federal courts. In recognition of this fact, this Court routinely grants *certiorari* to resolve conflicts raising jurisdictional or procedural questions—even in cases that involve only questions of "where" or "when" to file. *See, e.g.*, *Cunningham v. Hamilton County*, 527 U.S. 198, 202-03 (1999) (deciding whether sanction order was immediately

appealable or appealable only after final judgment rendered); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 582-83 (1999) (deciding whether courts must consider jurisdictional arguments in a particular order); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 869 (1998) (deciding whether party was required to file initially with arbitration panel or with district court); *Mississippi v. Louisiana*, 506 U.S. 73, 75 (1992) (deciding where party was required to file initially, with district court or with Supreme Court). *See also* Robert L. Stern *et al.*, SUPREME COURT PRACTICE 253-54 (8th ed. 2002) (observing that Court frequently grants *certiorari* to decide questions of federal practice as part of supervisory power).

This procedural disuniformity, moreover, is causing aliens inadvertently to lose their constitutional claims, *see, e.g.*, *Robledo-Gonzales v. Ashcroft*, 342 F.3d 667, 680-81 (7th Cir. 2003) (dismissing criminal alien's constitutional claims asserted in habeas proceeding on ground that alien failed to raise them in a petition for direct review to the court of appeal), and/or to clog the courts with redundant petitions out of an "abundance of caution." Pet. 16. This Court's review is thus necessary to end this procedural confusion.

II. THE PETITION IS AN APPROPRIATE VEHICLE TO DECIDE WHETHER FEDERAL COURTS OF APPEALS HAVE JURISDICTION TO REVIEW A CRIMINAL ALIEN'S SUBSTANTIAL CONSTITUTIONAL CLAIMS.

Respondent also wrongly suggests that this petition is not a suitable vehicle for deciding the question presented, because petitioner supposedly (i) has failed to exhaust administrative remedies and (ii) can assert no meritorious constitutional claim. These arguments are both irrelevant and erroneous.

As an initial matter, respondent's "vehicle" arguments are misplaced. The lower court did not rule on, or even consider, respondent's exhaustion or merits-based claims. Pet. App. 1a-2a; Pet. 17-18. Indeed, respondent did not even raise its

exhaustion argument below. Thus, there is no alternative lower court holding for this Court to consider. On the contrary, the decision below rests *only* on the threshold jurisdictional question that is dividing the courts of appeals. *See* Pet. 17-18.

Moreover, respondent has not identified a true "vehicle problem" because neither its exhaustion nor merits-based arguments—even if true—could preclude the Court from deciding whether § 1252(a)(2)(C) strips the federal courts of appeals of jurisdiction over substantial constitutional claims. At best, respondent has identified new arguments that some court will need to consider before deciding Louis' claims. But because there is no legally-compelled "sequencing of jurisdictional issues," this Court is free to "choose among threshold grounds for denying audience to a case on the merits" and thus can leave these other arguments for the court of appeals' resolution on remand. *Ruhrgas AG*, 526 U.S. at 584-85.

In accord with the principle that it is free to leave alternative arguments for remand, this Court has in numerous instances granted petitions that present a jurisdictional question dividing the lower courts even though other threshold issues, including other jurisdictional arguments, could be advanced on remand and ultimately preclude review of the petitioner's claim. *See, e.g.*, *id.* at 582-83 (considering whether federal courts can determine personal jurisdiction in advance of subject matter jurisdiction, even though petitioner's claims would inevitably be dismissed on personal jurisdiction grounds); *Edelman v. Lynchburg College*, 535 U.S. 106, 119 (2002) (considering whether petitioner's failure to timely file form with EEOC was a bar to exercise of jurisdiction even though district court had dismissed on alternative jurisdictional ground that the form was not otherwise proper). *See also* Opp'n of United States in *Clay v. United States*, No. 01-1500, at 11-12 (June 7, 2002), *cert. granted* June 28, 2002 (unpersuasively arguing that Court

should deny petition in light of other threshold bars); Opp'n of United States in *Nguyen v. United States*, Nos. 01-10873 & 02-5034, at 7-8 (Sept. 30, 2002), *cert. granted* Nov. 4, 2002 (unpersuasively arguing denial appropriate because petitioner had waived right to contest threshold requirement). Indeed, this Court's jurisprudence suggests that the question presented should be decided *before* respondent's alternative arguments, because to resolve the latter, the Court would have to determine the merits of Louis' constitutional claims. *See infra* pp. 5-8. But "[i]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *see also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101-02 (1998) (courts must resolve questions of subject matter jurisdiction, like the question presented, before arguments concerning the merits of a claim).

In all events, the "alternative" arguments that respondent identifies are erroneous.

First, respondent's exhaustion argument (Opp'n 6-8)—raised for the first time in its opposition—is wrong. There is a well-recognized "exception to the exhaustion requirement . . . carved for constitutional challenges to the Immigration and Naturalization Act and INS procedures." *Rashtabadi v. INS*, 23 F.3d 1562, 1567 (9th Cir. 1994). "Because the BIA has no jurisdiction to adjudicate constitutional issues, the Act's exhaustion requirement does not preclude petitioners from raising them for the first time before the Court of Appeals." *Id. See also Singh v. Reno*, 182 F.3d 504, 511 (7th Cir. 1999) ("[C]onstitutional due process claims—like the one raised here—may not require exhaustion because there has been a showing that the BIA could not deal dispositively with the matter."); *Nehme v. INS*, 252 F.3d 415, 421 (5th Cir. 2001) ("The BIA does not have jurisdiction to decide the constitutionality of the acts of Congress. Therefore, Nehme would not be required to have exhausted

his constitutional arguments before the BIA.") (internal citations omitted).

The cases on which respondent relies for the contrary proposition (Opp'n 7-8) are inapposite. Those cases expressly acknowledge the "exception to the exhaustion requirement for constitutional challenges to statutes and to the administrative rules of procedure." *Silva-Calderon v. Ashcroft*, 358 F.3d 1175, 1177 (9th Cir. 2004); *see also Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004) ("We recognize that the principle of exhaustion may exclude certain constitutional challenges that are not within the competence of administrative agencies to decide.") (footnote omitted); *Bernal-Vallejo v. INS*, 195 F.3d 56, 64 (1st Cir. 1999) ("There are some claims of denial of due process or deprivation of constitutional rights that are exempt from this exhaustion requirement because the BIA has no power to address them."); *Liu v. Waters*, 55 F.3d 421, 425 (9th Cir 1995) ("[T]he BIA lacks jurisdiction to decide questions of the constitutionality of governing statutes or regulations.").

They hold only that where the BIA has committed some procedural error within its competence to correct, it should be given an opportunity to correct the error. Louis, however, is not claiming that the BIA committed a procedural error of constitutional dimension, but challenges the constitutionality of the regulations that allowed him to be stripped of his removal rights without notice and after his case was closed, as well as the constitutionality of respondent's acts. *See infra* pp. 7-8.

In addition, this Court has recognized that statutory exhaustion requirements do not apply to claims "wholly collateral" to an agency's review and outside of "the agency's expertise." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212 (1994). *See also Singh*, 182 F.3d at 510 (where constitutional challenge concerned timeliness of INS's actions, not BIA review itself, exhaustion requirement did not

apply). Here, the issue is not the propriety of the BIA's review, but the "wholly collateral" issue of the constitutionality of respondent's notice and the prevailing regulations, neither of which is in the BIA's jurisdiction, let alone its "expertise."

Second, Louis can assert a cognizable constitutional claim. As this Court has observed, a constitutional claim can be dismissed as a jurisdictional matter only where the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974); *see also Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 359 (1959). There is no precedent of this Court that would foreclose Louis' argument that (i) respondent's notice was constitutionally defective; (ii) the governing regulations which allow the BIA to reopen a case without actual notice to an alien are constitutionally defective; and (iii) the regulations allowing the BIA to reopen closed cases at any point in the future based solely on a change in law are unconstitutional.

Importantly, respondent says nothing whatsoever about Louis' last two constitutional claims. Thus, it would be wholly inappropriate at this point to speculate about their merit.

With respect to its arguments on Louis' first constitutional claim (Opp'n 8-11), respondent identifies no decision of *this* Court that would foreclose or render "implausible" Louis' claim that his right to due process was violated. Its citation (*id.* at 9) to a single First Circuit decision (holding that due process does not require notice to an alien) is simply insufficient to render Louis' claim implausible, as this Court has recognized that "[a]n elementary and fundamental requirement of due process in *any* proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of

the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis supplied). *See also U.S. ex rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103, 106 (1927) ("Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process . . . ."). Respondent's suggestion that any constitutional infirmity could be resolved by reopening the case (Opp'n 9), moreover, is inconsistent with this Court's holding in *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965), that the availability of motions to reconsider cannot cure a constitutionally defective notice where, as here, it is harder to prevail on such a motion.

Finally, respondent is wrong to claim that Louis must demonstrate prejudice. In *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988), this Court rejected the argument that a party deprived of notice of a proceeding has no constitutional claim if that party would have inevitably lost, calling it constitutionally "untenable." *Id.* at 85. In all events, had Louis been given notice of respondent's motion to reopen the case, he could have argued that there were insufficient grounds to reopen the proceeding. *See* 8 U.S.C. § 1229a(c)(6)(B). And if Louis were correct that the proceeding against him could not have constitutionally been reopened, the BIA's decision would have to be vacated as *ultra vires*. Accordingly, Louis can demonstrate prejudice.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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